

PERSPECTIVES ON LAW  
ECONOMIC ANALYSIS OF LAW

Ron Daniels  
Robert Howse  
Jeff MacIntosh  
J. Robert S. Prichard  
Hamish Stewart  
Michael Trebilcock  
Catherine Valcke  
Arnold Weinrib  
Gillian Hadfield

Faculty of Law  
University of Toronto

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FACULTY OF LAW  
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**M E M O R A N D U M**

**To:** First-Year Instructors and Students  
**From:** Associate Dean Jim Phillips  
**Date:** 18 November, 1994  
**Re:** **Bridge #3 - Law and Economics**

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The third bridge week - Law and Economics - is scheduled for the week of January 2 - January 6. It will begin at 2:00 p.m. on Monday, January 2. Small groups will meet on the Monday morning as follows:

9.15 - 10.30 Criminal C (Shaffer) - Rowell Room  
Criminal F (Friedland) - Falconer 2  
Criminal B (Roach) - Falconer 3  
Criminal E (Dickens) - Flavelle Room  
Criminal A (Brudner) - Falconer 1  
Constitutional D (Risk) - Flavelle A

10.45 - 12.00 Constitutional C (Rogerson) - Flavelle A  
Property A (Knop) - Rowell Room  
Constitutional A (Beatty) - Falconer 1  
Criminal D (Stewart) - Falconer 3  
Contracts A (Waddams) - Falconer 2  
Constitutional B (Macklem) - Flavelle Room

**BRIDGE SCHEDULE**

**MONDAY, JANUARY 2**

All lectures will be given in BLH.

2 - 3: M. Trebilcock, Introduction to Law and Economics

3.10 - 4: M. Trebilcock, Property Rights

4.10 - 5: R. Howse, Privatization in Eastern Europe

*For Monday's lectures read Sections I, II and III of the materials.*

## TUESDAY, JANUARY 3

9 - 10: R. Daniels, The Coase Theorem

10.10 - 11: R. Prichard, Tort Law

11.10 - 12: R. Prichard, Tort Law

*For Tuesday's lectures read sections IV and V of the materials.*

2 - 3.30: Discussion Groups; *for this discussion group read section VI of the materials and the Review Problems.\**

## WEDNESDAY, JANUARY 4

9 - 10: G. Hadfield, Contracts: Coercion

10.10 - 11: G. Hadfield, Contracts: Information Failure

11.10 - 12: C. Valcke, Contracts: Remedies for Breach

*For Wednesday's lectures read Section VII of the materials.*

2 - 3.30: Discussion Groups; *for this discussion group read section VIII of the materials and the Review Problems.\**

## THURSDAY, JANUARY 5

9 - 10: M. Trebilcock, Commodification

10.10 - 11: H. Stewart, Criticisms of Law and Economics

*For Thursday's lectures read section IX of the materials.*

11: Distribution of Assignment

\* NOTE: A separate memorandum will be distributed on the organisation of the discussion groups on Tuesday and Wednesday.

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CHAPTER I

OVERVIEW: LAW AND ECONOMICS

M.J. Trebilcock: An Introduction to the Economic  
Approach to Law . . . . . I-1



Michael J. Trebilcock, "An Introduction to the Economic Approach to Law", presented at the 1993 New Zealand Law Conference, rev. Feb. 17, 1994.

## I A CONCEPTUAL OVERVIEW OF THE ECONOMIC PERSPECTIVE ON LAW

### (1) Intellectual History

Many of the great political economists of the past, such as Adam Smith, Jeremy Bentham, John Stuart Mill, and Karl Marx understood the intimate relationship between the configuration of a country's legal system and the configuration of its economy. One of the great ironies in the evolution of intellectual disciplines over the past century or so is that the theory of the gains from specialization, which Adam Smith argued so persuasively for in the economy at large in The Wealth of Nations in 1776, and which he defied so spectacularly in the sweep of his own work, has been adopted, with largely unbridled enthusiasm, in many scholarly disciplines. For example, until recently, much legal education and research has tended to ignore the impact of a country's legal system on its economy, and the reverse - the impact of economic forces on the operation of its legal system. Equally, modern economics, with its predilection for very abstract mathematical modelling of fine theoretical issues, has tended to underemphasize institutional factors that bear on how an economy or sectors of it are actually likely to function in the real world.

Prior to 1960, most North American law schools paid attention only to anti-trust, public utility regulation, and perhaps tax policy from a law and economics perspective (sometimes referred to as the "old" law and economics). However, beginning in the early 1960s with pioneering articles by Guido Calabresi<sup>1</sup> on tort law and Ronald Coase<sup>2</sup> (the 1991 Nobel Prize winner in economics) on property

rights, followed by prolific writings and a comprehensive text by Richard Posner<sup>3</sup> on a vast range of legal issues, the field of law and economics has burgeoned with many lawyers and economists around the world now exploring the economic implications of almost every aspect of the legal system. The "new" law and economics is often as much interested in non-market as market behaviour to which the "old" law and economics largely confined itself. This development has been accompanied by the initiation of a number of specialized law and economics oriented scholarly journals, and the appointment or cross-appointment of professional economists to the faculties of most major North American law schools. In turn, within their own discipline, economists have recently revived an institutional tradition with the emergence of fields such as public choice theory (which models collective decision-making e.g. politics, in a rational, self-interested actor framework) and transaction cost economics (which attempts to explain alternative contractual and organizational structures in terms of the relative costs of economic coordination associated with each).<sup>4</sup> The emergence of economic analysis of law has not only attracted many followers, but has also provoked intense controversy, and in this latter respect can claim some credit for helping to reinvigorate competing perspectives on law.

In this essay, I will review the distinctive characteristics of the major forms of law and economics scholarship, both positive and normative, suggesting the kinds of insights that each form can

contribute to legal scholarship, but also indicating major limitations of the perspective. I then illustrate some of the strengths and limitations of the economic analysis of law in two areas of law of central importance to market economies - property rights and contract law. I then briefly review some of the vast range of issues in other areas of law that have been addressed in law and economics scholarship. I follow this review with a comparative systems analysis of an illustrative allocative problem - allocating scarce life-saving technology - to highlight the virtues and vices of alternative allocative mechanisms in any society. I conclude the essay by making a constrained and I hope modest claim for the contributions of economic analysis of law. I believe that making Panglossian or imperialistic claims for a particular theoretical perspective is likely to lead to its being discredited and diserved, while acknowledging its limitations is not to reject all utility to the perspective. I doubt that other major theoretical perspectives can fairly make grander claims.

## **(2) Positive and Normative Economic Analysis**

The central preoccupation of economics is the question of choice under conditions of scarcity. Given scarcity, economics assumes that individuals and communities will (or should) attempt to maximize their desired ends (which may be of infinite variety) by doing the best they can with the limited resources (means) at their disposal. To the extent that means (or resources) can be made relatively less scarce, or stretched further, more ends or goals of

